IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-16-0004-CR
No. 05-16-0005-CR
No. 05-16-0006-CR

EX PARTE WARREN KENNETH PAXTON, JR.

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause nos. 416-81913-2015, 416-82148-2015, 416-82149-2015

PAXTON'S OPPOSITION TO APPELLEE'S MOTION FOR LEAVE TO FILE PRE-SUBMISSION LETTER BRIEF

TO THE HONORABLE JUSTICES OF THE FIFTH COURT OF APPEALS:

Appellant, Warren Kenneth Paxton, Jr. ("Paxton"), opposes Appellee's ("State") Motion for Leave to File Pre-Submission Letter Brief as follows:

There is no provision in Rule 38 or anywhere else in the Texas Rules of Appellate Procedure that allows Appellee to file a sur-reply. Nor can the State justify the need for its tardy briefing. Rule 38.3 provides that Paxton may file a reply brief addressing any matter in the State's brief. Paxton did so. Now, Appellee attempts to circumvent the rules by christening its briefing a "Pre-Submission Letter Brief." Although this Court, pursuant to Rule 38.7, has discretion in the interests of justice to allow supplemental pleading "whenever

justice requires," justification does not exist under these circumstances nor can Appellee articulate an appropriate justification. Letter Briefs are traditionally used to refer the court to new cases not previously made and cited. That is not the situation with the State's filing.

Moreover, Paxton is prejudiced by the State's late filed pleading, which appears on the eve of oral argument.[1] The State approached Paxton's counsel on April 27, 2016, for a meet and confer call on the Motion for Leave. At this juncture, the Motion was complete. Paxton's counsel asked for a copy of the finished pleading by email (Exhibit "A"). The State never responded to the email and the pleading was never provided until this tardy filing. The State's briefing amounts to an ambush with new, additional arguments made on the threshold of oral arguments, presents irrelevant authority, and mounts specious arguments which Paxton has insufficient opportunity to adequately or fairly respond.

The deficiency of the State's motion and inappropriateness of its sur-reply are demonstrated as follows:

[1] This Court recently granted an opposed "Motion for Leave to File Appellee's Reply Brief" in No. 15-00202-CV, which is set a May 10, 2016, oral argument. However, that leave was sought on March 25, 2016, more than *six weeks prior to* oral argument allowing Appellant ample time to reply if necessary. The movant in that case was even apologetic for filing so late. *See* *http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a5d5fb66-0f2b-4346-a0f5-06310ea3d319&coa=coa05&DT=Brief&MediaID=55cf9c8a-ae9f-4df8-8a72-a1c2dcb2beb5* at pg. 4-5.

COGNIZIBILITY

Rather than present new authority, the State merely re-hashes its previous argument. Doing so, it inaccurately references the lower court's opinion in *Ex Parte Perry*, which actually recognized (but questioned) *Psaroudis* and then was implicitly overruled by the Court of Criminal Appeals. *Sur-reply* at fn. 3; *compare Ex Parte Perry*, 471 S.W.3d 63 at 79, rev'd in part, *Ex Parte Perry*, No. PD-1067-15, slip op. (Tex.Crim.App. February 28, 2016).

PAXTON'S FIRST POINT OF ERROR

Respecting Paxton's First Writ, the State ignores the evidence admitted without objection, that MCM was federally registered until October 2012, urging that this registration was either non-existent or illegal without any citation to compelling authority. Texas Courts repeatedly hold that the term "shall" is, at most, mandatory and does not alone create a sanction for failure to comply. *See, e.g., State v. $435,000.00*, 842 S.W.2d 642, 644 (Tex. 1992); Cf. *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310–11 (Tex. 1976) (interpreting administrative rule containing "shall" to be merely directory, not mandatory); *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956) (interpreting statute containing "shall" to be merely directory, not mandatory); *Thomas v. Groebl*, 212 S.W.2d 625, 630–32 (Tex. 1948) (same). Federal Courts reach similar conclusions. "The Supreme Court has recognized many instances in

which virtually no consequence exists for noncompliance with a statutory timing provision that does not specify a consequence for missing the deadline." *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010) citing, e.g., *Dolan v. United States*, 560 U.S. 605, 607-08, 130 S.Ct. 2533, 2538, 177 L. Ed. 2d 108 (2010). *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 64-65, 114 S.Ct. 492, 126 L. Ed. 2d 490 (1993); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171-72, 123 S.Ct. 748, 154 L. Ed. 2d 653 (2003).

Even then, for Paxton to comply with State law during MCM's dual registration period, he would only have had to notice-file, not register, the omission of which is not a crime according to the legislative history ignored by the State.

PAXTON'S SECOND POINT OF ERROR

The State's additional briefing on Paxton's Second Issue provides no additional relevant authority and conflates the first and second writs. The State's argument that "late registration does not shield Paxton from prosecution even as he cloaks his preemption claim in vagueness terms" is nonsensical. Paxton's supposed late registration has absolutely nothing to do with the vagueness claims in Paxton's second writ. Likewise, the Arizona case cited is irrelevant.

The Arizona case does not consider whether a specific, state securities law definition was pre-empted by a federal one. Rather, *Far West* debates whether a general penal code homicide prosecution was pre-empted by a criminal

consequence in a federal OSHA regulation. *State v. Far West Water & Sewer Inc.*, 228 P.3d 909, 919-920 (Ariz. Ct. Appls. 2010). The Arizona decision relied upon a Texas case, *Sabine Consolidated v. State,* 806 S.W.2d 553 (Tex.Crim.App. 1991), which recognizes, as Paxton urges, the three types of pre-emption and distinguished pre-emption of state regulations directly related to the federal law under each type from pre-emption of general criminal codes by federal regulations. *Id.* at 556-559. The statute in Paxton's case is *not* a general, penal law. Rather, it is whether the specific state regulatory regime is pre-empted by the federal statute governing the same conduct. The State's new authority is entirely irrelevant.

PAXTON'S THIRD POINT OF ERROR

The State continues to ignore and avoid the evidence in the certified reporter's record of the impanelment proceeding containing an indisputably accurate rendition of the grand jury's formation. Now, one week before oral arguments, the State changes its argument from "pre-qualification by the District Clerk" to "pre-qualification by the District Judge" without any description of said pre-qualification or supporting reference in the impanelment transcript. This unfairly deprives Paxton of the ability to meaningfully respond. Then, the State cites inapplicable cases which do not support its position.

For example, *Johnson v. State* was an appeal from a motion to suppress, not a writ of habeas corpus. The State intentionally omits the remainder of the paragraph it cites, which continues,

> Such motions are reviewed pursuant to a bifurcated standard under which "[t]he trial judge's determinations of historical facts and mixed questions of law and fact that rely on credibility are granted almost total deference when supported by the record. But when mixed questions of law and fact do not depend on the evaluation of credibility and demeanor, we review the trial judge's ruling de novo." Kerwick, 393 S.W.3d at 273, citing Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997).
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> - *Johnson v. State*, 414 S.W.3d 184, 192 (Tex.Crim.App. 2013).

Similarly, *Battles v. State* addressed a suppression issue and also held that "[w]e review de novo mixed questions of law and fact that do not depend on an evaluation of credibility and demeanor." *Battles v. State*, 2014 WL 5475394 at *3 (Tex. App. – Dallas Oct. 30, 2014, no pet.)(not designated for publication) citing *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex.Crim.App. 2008). *Charles v. State*, addressed conflicting affidavit evidence in a motion for new trial proceeding. *Charles v. State*, 146 S.W.3d 204, 208-210 (Tex.Crim.App. 2004). Paxton's case is neither a motion to suppress nor dependent upon affidavit or any other *testimony*, rather it is the undisputed reporter's record of the impanelment proceeding.

The State disingenuously argues that because Paxton did not object to the admission of Ms. Leyko's testimony, error was not preserved. As the state well knows, Paxton does not complain Ms. Leyko's testimony was inadmissible, Paxton claims that it is unnecessary to this appeal given the court reporter's transcript of the impanelment proceeding. The State conflates the review as to evidence admission rulings with the standard of review applicable in this case with the hope that it distracts the Court from the impanelment transcript. The mixed questions of law and fact in this case do not depend on Ms. Leyko's credibility, demeanor or opinion. There is a certified reporter's record of what the Impaneling Judge said and did and this Court will render its own opinion of the legality of the impaneling judge's actions.

PAXTON'S FOURTH POINT OF ERROR

The State misstates the holding of *Ex Parte Wheeler*, 478 S.W.3d 89, 94 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). Instead of holding that the solicitation is conduct and not speech, the Court of Appeals found that solicitation was speech, but that offers to engage in illegal transactions, such as sexual assault of minors, are categorically excluded from First Amendment protection. *Id.,* citing *Ex Parte Lo*, 424 S.W.3d 10, 19 (Tex.Crim.App. 2013).

The statute in this case relates to constitutionally protected commercial speech regulating solicitation to engage in legal, commercial transactions, not

constitutionally unprotected speech relating to solicitation to engage in illegal sexual acts. *See id.* at 94. None of the "new authority" citied by the State is particularly relevant or can help it to escape from the obvious: (i) § 29(I), as it incorporates § 4P, regulates commercial speech, (ii) the State failed to meet its burden under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L. Ed. 2d 341 (1980). Moreover, § 29 is not limited, or even targeted at constitutionally unprotected speech that is untruthful and deceptive. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2672, 180 L. Ed. 2d 544 (2011).

The State's opportunity to develop a factual record to meet its burden under *Central Hudson* lapsed. The State has failed to carry its burden.

CONCLUSION

Paxton requests that this Court deny Appellee leave to file what amounts to a sur-reply brief, and for any other relief to which he may be entitled.

Respectfully submitted,

HILDER & ASSOCIATES, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, a true and correct copy of the above and foregoing ***Opposition to Appellee's Motion for Leave to File Pre-Submission Letter Brief*** was served on all counsel of record via the electronic case filing service provider contemporaneous with electronic filing.

/s/ Philip H. Hilder
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Philip Hilder

From: Philip Hilder <philip@hilderlaw.com>
Sent: Wednesday, April 27, 2016 10:50 PM
To: 'Brian Wice'
Subject: : appeal

Brian- This communication confirms that we oppose the filing of a "sur-reply". You stated that you intend to file the document regardless of our position. Since the document is ready, we appreciate if you would file now rather than waiting until the end of next week as stated. Thank you, Philip

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